

Chapter II

STATUTORY MANDATE OF THE MBC ENFORCEMENT MONITOR

Business and Professions Code section 2220.1 establishes the position, role, functions, and authority of the Medical Board Enforcement Program Monitor.¹⁷

Section 2220.1 was enacted in SB 1950 (Figueroa) (Chapter 1085, Statutes of 2002), which resulted from MBC's 2001–02 sunset review by the Joint Legislative Sunset Review Committee (JLSRC) and the Department of Consumer Affairs. During that review, the Board's physician discipline system was heavily criticized in the media — primarily in an April 2002 *Orange County Register* series — for a number of critical flaws, including lengthy case processing delays (during which physicians who have injured patients continue to practice), excessive fragmentation (leading to inconsistencies in the investigation and prosecution of physicians), questionable case processing priorities, and a loopholed public disclosure policy that permitted physicians to evade disclosure of their misdeeds and failed to provide sufficient information to enable patients to protect themselves and their families from dangerous physicians. In addition, the *Orange County Register* series revealed a number of other failures that exacerbate the flaws in MBC's system, including inadequate reporting of serious physician misconduct to the Medical Board by hospitals, courts, and insurance companies.

SB 1950 addressed several of the flaws identified by the media and the JLSRC during MBC's sunset review. As discussed below, SB 1950 established statutory case processing priorities for the Board; specified additional malpractice judgments, settlements, and arbitration awards that must be reported to the Board by insurers; closed a loophole that was preventing the disclosure of serious malpractice judgments; and authorized — for the first time in California — the public disclosure by MBC of some civil malpractice settlements. Finally, the bill created an “an independent enforcement monitor”¹⁸ to study the Board's enforcement program for a two-year period and make recommendations to strengthen and improve it.

¹⁷ Section 2220.1 — which is attached as Appendix A — was added by SB 1950 (Figueroa) (Chapter 1085, Statutes of 2002); amended by SB 364 (Figueroa) (Chapter 789, Statutes of 2003); and again amended by SB 136 (Figueroa) (Chapter 909, Statutes of 2004).

¹⁸ The need for an “independent” monitor was stressed in the analyses of SB 1950 (Figueroa) prepared by the Senate Business and Professions Committee (May 7, 2002), the Assembly Health Committee (August 15, 2002), and Assembly Floor staff (August 24, 2002).

The “enforcement monitor” concept is not new. The California Legislature has created “enforcement monitor” positions at three other occupational licensing agencies in the past two decades.¹⁹ The concept is similar to that of an external independent auditor — independent of the board to be studied, and independent of the profession regulated by that board. Under all “enforcement monitor” legislation, the agency must cooperate with the monitor, who is delegated significant investigative authority and charged with conducting a lengthy in-depth study of a particular regulatory program, making findings and recommendations, and proposing legislative, regulatory, or administrative changes to improve the efficiency, effectiveness, and quality of the program and its decisionmaking.

Section 2220.1 charges the Medical Board Enforcement Monitor with evaluating “the disciplinary system and procedures of the board, making as his or her highest priority the reform and reengineering of the board’s enforcement program and operations and the improvement of the overall efficiency of the board’s disciplinary system.”²⁰ Over a two-year period, the Monitor must focus on “improving the quality and consistency of complaint processing and investigation, reducing the timeframes for completing complaint processing and investigation, reducing any complaint backlog, . . . [and] assuring consistency in the application of sanctions or discipline imposed on licensees”²¹ The Monitor’s study must “include the following areas: the accurate and consistent implementation of the laws and rules affecting discipline, appropriate application of investigation and prosecution priorities, particularly with respect to priority cases, as defined in Section 2220.05, board and Attorney General staff, defense bar, licensee, and patients’ concerns regarding disciplinary matters or procedures, and the board’s cooperation with other government agencies charged with enforcing related laws and regulations governing physicians and surgeons.”²²

The MBC Monitor is also tasked with several specific duties:

- (1) The Monitor must “assess[] the relative value to the board of various sources of complaints or information available to the board about licensees in identifying

¹⁹ SB 1543 (Presley) (Chapter 1114, Statutes of 1986) enacted Business and Professions Code section 6086.9, which created a State Bar Discipline Monitor charged with evaluating and recommending improvements to the State Bar’s attorney discipline system. SB 2029 (Figueroa) (Chapter 1005, Statutes of 2000) enacted Business and Professions Code section 7092, which created the Contractors State License Board (CSLB) Enforcement Monitor position to study and recommend changes to CSLB’s contractor enforcement program. SB 26 (Figueroa) (Chapter 615, Statutes of 2001) enacted Business and Professions Code section 1601.3 to create the Dental Board Enforcement Monitor post at the Dental Board of California. Additionally, SB 1542 (Figueroa), recently signed by Governor Schwarzenegger (Chapter 572, Statutes of 2004), creates a “Bureau of Automotive Repair Administration and Enforcement Monitor” effective in January 2005.

²⁰ Bus. & Prof. Code § 2220.1(c)(1).

²¹ *Id.* at § 2220.1(c)(2).

²² *Id.*

licensees who practice substandard care causing serious patient harm.”²³ This duty is restated and clarified in Business and Professions Code section 2220.1(d), which requires the Monitor’s Initial Report — that is, this report — to “include an analysis of the sources of information that resulted in each disciplinary action imposed since January 1, 2003, involving priority cases, as defined in Section 2220.05.”²⁴

- (2) The Monitor must “evaluate the method used by investigators in the regional offices for selecting experts to review cases to determine if the experts are selected on an impartial basis and to recommend methods of improving the selection process.”²⁵
- (3) Finally, the Monitor is required to “evaluate the effectiveness and efficiency of the board’s diversion program and make recommendations regarding the continuation of the program and any changes or reforms required to assure that physicians and surgeons participating in the program are appropriately monitored and the public is protected from physicians and surgeons who are impaired due to alcohol or drug abuse or mental or physical illness.”²⁶

During the two-year period, the Monitor is required to publish two reports — an initial report on November 1, 2004 (which will be the subject of MBC’s 2004–05 sunset review by the Joint Committee on Boards, Commissions and Consumer Protection), and a final report on November 1, 2005. The statute requires the Monitor to “make every effort to provide the board with an opportunity to reply to any facts, findings, issues, or conclusions in his or her reports with which the board may disagree.”²⁷

To enable the Monitor to accomplish these duties, section 2220.1 requires “the board and its staff” to “cooperate with [the Monitor],” and to “provide data, information, and case files as requested by the enforcement monitor to perform all of his or her duties.”²⁸ The legislation also

²³ *Id.*

²⁴ See *infra* Ch. VI.A., and specifically Ex. VI.F., for this required analysis. Business and Professions Code section 2220.08(d), which imposes new procedures for complaint processing on the Board’s Central Complaint Unit, also charges the Monitor with analyzing a specific issue in this Initial Report — “whether a complaint received by the board relating to a physician and surgeon who is the subject of a pending investigation, accusation, or on probation should be reviewed pursuant to this section or referred directly to field investigation.” See *infra* Ch. VI.A. for this required analysis.

²⁵ Bus. & Prof Code § 2220.1(c)(2). See *infra* Ch. VIII.A. for this required analysis.

²⁶ Bus. & Prof Code § 2220.1(c)(2). See *infra* Ch. XV for this required analysis.

²⁷ Bus. & Prof. Code § 2220.1(d).

²⁸ *Id.* at § 2220.1(c)(3).

expressly delegates to the Enforcement Monitor “the same investigative authority” as the Director of the Department of Consumer Affairs.²⁹ Business and Professions Code section 153 sets forth the investigative authority of the DCA Director: “The director may investigate the work of the several boards in his department and may obtain a copy of all records and full and complete data in all official matters in possession of the boards, their members, officers, or employees, other than examination questions prior to submission to applicants at scheduled examinations.”

As noted above, the Enforcement Monitor is expressly charged with reviewing MBC’s Diversion Program. As participation in the Diversion Program is frequently absolutely confidential, Diversion Program case files — and the substance abuse/mental health treatment records that are often found in them — are of special sensitivity. Substance abuse/mental health treatment records are entitled to confidentiality under both federal and state law. However, those laws make an exception to the confidentiality requirement for “qualified personnel for the purpose of conducting scientific research, management audits, financial audits, or program evaluation,” so long as those personnel do not “identify, directly or indirectly, any individual patient in any report of such research, audit, or evaluation, or otherwise disclose patient identities in any manner.”³⁰

Thus, the Monitor is expressly authorized to inspect — and the Board and its staff are required to provide and have so provided — documents within the possession of the Board that are relevant to the Monitor’s statutorily-required inquiry. This includes public information and a vast array of non-public, confidential information — including complaints, investigative materials, case files (both Enforcement and Diversion), substance abuse/mental health treatment records, and policy and procedure manuals of all types.

Finally, section 2220.1 sets forth the appointment process for the Monitor. Under the statute, the DCA Director supervises the Monitor. The statute requires the DCA Director to advertise the position, and mandates that eligible applicants must have “experience in conducting investigations and familiarity with state laws, rules, and procedures pertaining to the board and with relevant administrative procedures.”³¹ On July 2, 2003, then-DCA Director Kathleen Hamilton published a request for proposals (RFP) concerning the MBC Enforcement Monitor position, and called for proposals by August 18, 2003. The Center for Public Interest Law (CPIL), based at the University of San Diego School of Law and experienced in two prior enforcement monitor projects, submitted a proposal prior to the deadline. On August 25, 2003, Director Hamilton notified CPIL that its proposal had been selected. On October 21, 2003, CPIL’s contract with DCA was finalized, and CPIL began the Enforcement Monitor project the next day.

²⁹ *Id.* at § 2220.1(c)(4).

³⁰ See 42 U.S.C. § 290dd-2(b)(2)(B); 42 C.F.R. § 2.1(b)(2)(B); Health and Safety Code § 11977(c)(3).

³¹ Bus. & Prof. Code § 2220.1(b).